principles involved in Ipoh High Court Civil Suit No. 416 of 1976 (*Mohamed Zainuddin bin Puteh* v. *Yap Chee Seng*[7]) which was a notice of motion that the interlocutory injunction granted be set aside. In that case I dismissed the motion and the interlocutory injunction was to remain. The appeal to the Federal Court was subsequently dismissed. In my judgment I referred to the principles involved as follows: —

"The law in granting or refusing interlocutory injunctions has a long and interesting history and the celebrated House of Lords case of *American Cyanamid Co.* v. *Ethicon*[1] was the most recent development. The simplest approach is expressed in an earlier case of *The Great Western Railway Company* v. *The Birmingham and Oxford Junction Railway Company & Ors.*[9] where the Lord Chancellor said:

'It is certain that the court will in many cases interfere and preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights.... It is true that the court will not so interfere, if it thinks that there is no real question between the parties;... In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favour of the plaintiff.'

The traditional theory underlying the grant or refusal of interlocutory injunction has always been that the court abstain from expressing any opinion upon the merits of the case until the trial — see *Wakefield* v. *Duke of Buccleugh.*[9] However more recently the courts have displayed what some refer to as a more robust approach, i.e. an approach guided by the apparent strength or otherwise of the plaintiff's case as disclosed in affidavits. In 1970 in *Cavendish House (Cheltenham) Ltd.* v. *Cavendish-Woodhouse Ltd.*[10] Harman L.J. (with Salmon L.J. concurring) said: "Therefore you start off with a *prima facie* case. That, of course is the essential prelude to the granting of interlocutory relief." This approach has now been abolished by the House of Lords in the *American Cyanamid* case and new principles have been set out in the following sequence. Firstly to discover whether the plaintiff's case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are evenly balanced it may not be improper for the court to take into account any tipping in the balance as revealed by affidavits."

I agree with counsel for the defendants that the three letters purported to have been written by members of the public cannot at this stage be considered as the writers have not been called.

Therefore my conclusions are as follows: —

(1) There was unreasonable delay in applying for interim relief and the delay has not been satisfactorily explained;

(2) There is no evidence of irreparable damage to entitle plaintiffs to the interim relief; and

(3) Looking at the evidence as are available, the balance of convenience would seem to be in favour of not granting the interlocutory injunction.

However, this is in my view a fit and proper case for an early trial so that a decision can be arrived at one way or another based on all evidence as will be available during the trial. Under the circumstances I dismiss the motion but direct that the Registrar consider this case be put on the priority list for an early date for hearing. Under the circumstances of this case I have also decided to make no order as to costs.

Motion dismissed.

Solicitors: *Lawrence Tan & Co.; Skrine & Co.*

IN RE MEENAL W/O MUNIYANDI

[O.Cr.J. (Hashim Yeop A. Sani J.) December 14, 1979]
[Kuala Lumpur — Federal Territory Criminal Application No. 18 of 1979]

Habeas Corpus — Detention under order of removal and under Immigration Act — Not unlawful — Whether wife of citizen has right to entry permit — Immigration (Prohibition of Entry) Order 1963, paragraph 3 and Schedule D. — Immigration Act, 1959/63 (Act 155), ss. 15 and 33(1) — Federal Constitution, Article 15.

Constitutional Law — Citizenship — Right of wife of citizen to entry permit — Right to be registered as citizen — Immigration Act, 1959/63 (Act 155), ss. 15 and 33(1) — Federal Constitution, Article 15.

The applicant an Indian national married a Malaysian citizen and when she came to Malaysia she was given an entry permit. She lived with her husband in Malaysia until 1960 and in that year she was given the status of a permanent resident and issued with a red identity card. In November 1970 she surrendered her red identity card and returned to India. In 1977 her husband applied to the immigration authority to bring back the applicant. He was advised that the applicant could enter on a social visit pass on an Indian passport valid for a year. The applicant therefore came to Malaysia in May 1979 and was issued with a social visit pass which was extended from time to time up to May 28, 1979. On the expiry of the visit pass the immigration authority issued a special pass to enable the applicant to make the necessary arrangement to leave the country. The special pass was periodically extended until September 3, 1979 but on that day her travel documents were impounded and she was removed to prison with a view to deportation. The applicant applied for *habeas corpus* to secure her release. The questions that arose were (i) whether the applicant was lawfully detained and (ii) what is the alleged right or entitlement of the applicant as the wife of a citizen under Article 15 of the Federal Constitution and the effect of certain provisions of the Immigration Act and Immigration Regulations on her.

Held: (1) the Order of Removal under section 33(1) of the Immigration Act and the Order of Detention issued against the applicant in this case were not illegal and therefore the detention of the applicant was not unlawful;

(2) the applicant was not entitled as of right to an entry permit to enter or remain in Malaysia by reason solely of the fact that her husband is a citizen.

Case referred to:-

(1) *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 M.L.J. 156.

CRIMINAL APPLICATION.

M. Shankar (*Mahalingam* with him) for the applicant.

Zaki bin Tun Azmi (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: The facts of this case disclose a sad and unfortunate story. The facts are briefly as follows. The applicant, Meenal w/o Muniyandi, an Indian national, married her husband, a Malaysian citizen under Hindu rites some time in March 1960 in India. Shortly thereafter she was brought into Malaysia on an Indian passport and on arrival was issued with an entry permit by the Immigration Department. Apparently she lived in this country with her husband until 1970 during which time she was issued with a red identity card, thereby obtaining the status of a permanent resident. During the same period she cohabited with her husband and gave birth to a number of children of whom two are still living. In November 1970 she surrendered her red identity card and returned to India. The reason

for her return to India and the surrender of the identity card as given in the affidavit of her husband dated December 4, 1979 was to accompany the husband's mother, who was mentally ill, to return to India and also to enable her father-in-law to arrange for "free passage", whatever that means.

In 1977 the husband applied to the immigration authority to bring back the applicant. The husband was interviewed by the immigration authority and was advised that the applicant could enter Malaysia on a social visit pass on an Indian passport valid for a year. That would perhaps be the standard reply to a request of this nature. The applicant came to Malaysia in May 1978 issued with a social visit pass which was extended from time to time up to May 28, 1979. On the expiry of the visit pass the immigration authority issued a special pass to enable the applicant to make the necessary arrangement to leave the country. The special pass was periodically extended until September 3, 1979 whereupon on that day all her travel documents were impounded by the immigration authority. On October 26, 1979 the applicant was removed to Pudu Prison with a view to deportation as a person whose presence in Malaysia was unlawful under the Immigration Act.

The applicant now seeks to secure her release on the grounds, *inter alia,* that as the wife of a citizen, she is *entitled* to remain in this country and that the refusal by the immigration authority to allow her to remain on being satisfied that she was the wife of a citizen was perverse and illegal. It might be added that the marriage between the applicant and the husband was solemnised under the Civil Marriage Ordinance only on August 23, 1978.

At the commencement of the hearing, counsel for the respondents raised a preliminary objection that prayers (b) and (c) should be struck out. Prayer (b) is the prayer for a declaration that a married woman whose husband is a citizen is entitled to have all facilities accorded to her to be registered as a citizen or alternatively that no action can lawfully be taken which involves interference with the applicant's rights to be registered as a citizen. Prayer (c) is the prayer seeking for an Order under Chapter VIII of the Specific Relief Act requiring the respondents to permit the continued residence of the applicant in Malaysia or alternatively to forbear to do any act which would have the tendency to injure or adversely affect the right of the applicant to qualify to register as a Federal Citizen. After a brief argument it was agreed that the applicant withdraw the said prayers (b) and (c) provided that this should not prejudice the right of the applicant to claim same by civil suit separately or to ask for consequential directions.

Thus what remain before the court now are the prayer for an order of *habeas corpus* to issue directing the respondents to produce the applicant before the court and to show cause why the applicant should not be set at liberty, and the prayer for such other order or directions as the facts of the case may warrant.

In my opinion there are two separate questions posed before the court which however are so closely inter-connected that both have to be considered simultaneously. The first question is the principal one, i.e. whether the applicant is lawfully detained. The second question is what is the form of the alleged right or entitlement of the applicant under Article 15 of the Constitution as the wife of a citizen and the effect of certain provisions of the Immigration Act and Immigration Regulations on her.

Normally detention is legally justified on very limited grounds, for example, detention pending trial, detention following a sentence by a court of competent jurisdiction or detention authorised under any written law. Traditionally, in all other common law countries, the greatest bulwark against arbitrary imprisonment is the writ of *habeas corpus* by which remedy the court will free a person wrongly detained and this power is often regarded as a cornerstone of the law's regard for personal liberty, irrespective whether the person is a citizen or not. In our country this remedy is contained in section 365 of the Criminal Procedure Code which simply provides that the High Court may whenever it thinks fit direct that any person who is "alleged to be llegally or improperly detained in public or private custody" be set at liberty. This is now entrenched in Article 5(1) and (2) of the Federal Constitution. According to the tenor of clause (5) of Article 5 this right would seem to be extended even to enemy aliens.

It is contended on behalf of the respondents that a proper Order of Detention had in fact been made against the applicant under the provisions of the Immigration Act and Immigration Regulations. According to the affidavit of Abu Bakar bin Manap, the Senior Assistant Director of Immigration, dated November 28, 1979 the applicant surrendered her red identity card on November 18, 1970 and went back to India without obtaining a re-entry permit, thereby losing her right to re-enter and remain permanently in Malaysia. The applicant now holds an Indian passport issued to her by virtue of her being an Indian citizen. On her return to Malaysia in 1978 she was given a social visit pass which was extended from time to time until March 27, 1979 on which date she was given a final extension up to May 28, 1979. On May 22, 1979 the applicant was still in this country and applied for a further extension but this was refused and a special pass was instead issued to her so as to enable her to make arrangements to leave the country. As she was indisposed and unfit to travel the special pass was subsequently extended six times in all until September 17, 1979. On September 14, 1979 the applicant came to the Immigration Office. She was then fit to travel and on the same date she was given a written reminder to leave the country by September 17, 1979 of which she acknowledged receiving a copy — photostat in Appendix *D* to the affidavit. The applicant did not appeal against this decision. On October 26, 1979 the applicant was arrested in pursuance of powers under the Immigration Act, 1959/1963 (Revised Act 155) as the immigration authority considered her continued presence in Malaysia would contravene section 15 of the Immigration Act. The Order of Removal under section 33(1) of the Immigration Act as well as the Order of Detention under section 34 of the same Act were made against the

applicant for the purpose of making arrangements to remove her from Malaysia — Order of Removal under section 33(1) of the Act — Appendix *E* and Order of Detention under section 34 of the Act — Appendix *F* of the same affidavit. The husband apparently made another application for an entry permit but this was rejected *vide* letter dated June 8, 1979 and no appeal was made against the rejection.

It seems to me that the basic and main proposition submitted on behalf of the applicant is that by virtue of Category *D* in the Schedule to the Immigration (Prohibition of Entry) Order, 1963 the wife of a Malaysian citizen and his child are both *not* prohibited immigrants and therefore have a right to enter Malaysia. The other connected and subsidiary proposition is that the decision to refuse the entry permit to the applicant is a nullity because it contradicted two previous decisions of the immigration authority which recognised the applicant as the wife of a citizen.

I will now deal with the first proposition. According to paragraph 3(1) of the Immigration (Prohibition of Entry) Order, 1963 (L.N. 227 of 1963), subject to paragraph 4 (relating to special provisions for Sabah and Sarawak) the entry into Malaysia is *prohibited* of all persons other than persons specified in sub-paragraphs (a) to (e). Sub-paragraph (e) is the one relevant in this case and sub-paragraph (e) states as follows: —

> "(e) any person who satisfies the Controller that he is within any of the categories of persons set out in the schedule to this Order."

Paragraph *D* of the Schedule to the Order reads as follows: —

> "D. The wife of any citizen of the Federation who —
>
> (i) having been married before the 1st day of December, 1954, has not at any time after that date been living separately from her husband for a continuous period of five years; or
>
> (ii) having been married on or after the 1st day of December, 1954, has not at any time been living separately from her husband for a continuous period of five years."

Sub-paragraph (ii) of paragraph *D* of the Schedule would be relevant in this case as her marriage under a written law took place in 1978. It is contended on behalf of the applicant that during the period 1970-1978 when the applicant was in India the husband regularly visited and cohabited with her in India during the specified periods set out in paragraph 3.9 of the affidavit of Muniyandi s/o Arumugam dated December 4, 1979, namely for periods 16.12.70 to 20.3.71, 10.6.72 to 17.9.72, 5.5.74 to 17.11.74, 27.6.76 to 5.10.76 and 6.2.78 to 10.5.78. Therefore it is contended that the applicant had been married to the citizen husband and has not been living separately from her husband for a continuous period of five years.

In my view a proper reading of sub-paragraph 3(1) of L.N. 227 of 1963 would reveal only the following proposition and nothing more, that is to say, that the entry into Malaysia is *prohibited except* with respect to persons specified in sub-paragraphs (a) to (e). The Schedule to the 1963 Order sets out a number of categories of persons e.g. a professional or persons with specialist qualifications, and persons with a special certificate from the Minister certifying that their admission is in the economic interest of the country. This simply means that the wife of a citizen specified in paragraph *D* of the Schedule to the Order constitutes only one of the classes of persons whose entry into Malaysia is *not prohibited* and therefore any of these persons referred to in the various categories under the said sub-paragraphs may apply for an entry permit under section 10 of the Immigration Act. Therefore non-citizen wives of citizens do not constitute a special class by themselves with special privileges or rights over and above any of those persons referred to in the other sub-paragraphs of paragraph 3(1) of L.N. 227 of 1963.

The other proposition contended on behalf of the applicant is a constitutional one and is slightly more intricate. To answer the proposition it is useful to go back to the history of Article 15 of the Constitution. In the final draft of the Constitutional Proposals for the Federation of Malaya (Command Paper 210, published by Her Majesty's Stationery Office London in June 1957) the proposed Article 15(1) read simply as follows: —

> "(1) Subject to Article 18 any woman who is married to a citizen is entitled, upon making application to the registration authority, to be registered as a citizen."

Clause 3 of the proposed Article 15 dealt with the reference to marriage as reference to a marriage registered in accordance with any written law in force in the Federation including any such law in force before Merdeka Day. The reasoning of the Reid Commission for the proposed provision of Article 15 is contained in paragraph 42 of the Report which simply said that they "recommend ... that women who have been married to citizens and children of citizens who are under twenty-one *should be entitled to be registered as citizens if they are not citizens already.*" However, an amendment to Article 15 was made in 1962 which brought about the present qualifications.

Article 15 of the Constitution has not been adjudicated upon by the courts and very little has been written on it. *Sheridan and Groves* in their Constitution of Malaysia at page 51,* apart from posing the problem caused by the word "residence" deal with the Article simply as follows: —

> "This article, together with articles 15A to 18, govern the acquisition of citizenship of Malaysia by registration.
>
> Much of the interpretation of article 15 is made easier by the provisions of part III of the second schedule, pages 243-248, post. For example, section 2 of that part makes it clear that there is no judicial review of decisions of the Federal government. Some difficulty, however, is occasioned by the vague expressions 'resident' (etc.) and 'good character' used in clauses (1) and (3)...."

Suffian in his Introduction to the Constitution of Malaysia deals with citizenship by registration and referred to non-citizen wives of citizens in the following terms at pages 214-216: —

> "It is to be noted that she is entitled to be registered. But the marriage must have been registered — under any written law in force in the Federation, including any written law in force before Merdeka Day or under any written law in force before Malaysia Day in any East Malaysia state.
>
> What if the wife of a Hindu who is a citizen wishes to become a citizen? Does she have to re-marry under the

* See now *Sheridan & Groves*, 3rd Edn. at p. 83.

civil marriage law in order to have her marriage registered? No. There is a special law enacted for this purpose in West Malaysia, the Registration of Marriages Ordinance No. 53 of 1952. She and her husband should apply to the Registrar of Marriages to have their marriage registered, and thereafter she may apply to be registered as a citizen under Article 15(1). However, if the marriage took place within the Federation, the marriage must be registered within three months. There is no time limit for a marriage that took place outside the Federation."

In an article published in the Constitution of Malaysia Its Development: 1957-1977 Mr. Visu Sinnadurai also touched on the subject of wives of citizens at pages 76-77 as follows: —

"A woman who is married to a citizen is entitled to be registered as a citizen. There were, however, certain qualifications to this rule. Firstly, the marriage must have been registered in accordance with any written law in force in the Federation. Secondly, no person who had renounced or had been deprived of her citizenship under the Constitution or any earlier law, may qualify to become a citizen under this provision. It was also provided that a woman who had acquired citizenship by Registration under this provision, may be deprived of such citizenship if her marriage to the citizen is terminated within two years of the marriage....

This provision relating to the registration of wives was amended in 1962 so as to make the provision more stringent. Certain new qualifications were inserted by the amendment: (i) that she had resided continuously in the Federation for a period of not less than two years immediately preceding the date of the application; (ii) that she intends to reside permanently therein, and (iii) a qualification which was in force under the Federation of Malaya Agreement and which was present in, other cases of registration: that she must be of good character. This new amendment was introduced largely to eliminate the possibility of acquisition of citizenship by a formal marriage of convenience entered into purely to enable acquisition of federal citizenship by a woman."

It would also seem to be the contention of counsel for the applicant that Article 15 of the Constitution confers a right on the non-citizen wife of a citizen to ask for and to be issued with an entry permit into Malaysia and that the immigration authority must accord all facilities so as to enable her to reside and cohabit with the citizen husband in Malaysia so that the qualification set out in Clause (1)(a) of the Article can be satisfied. In other words a person, such as the applicant, should be accorded all facilities to reside continuously in Malaysia for two years preceding the date of the application for registration as a citizen.

This argument is attractive but it has many flaws. Firstly, under the second limb of Clause (1) of Article 15 apart from the fact that she must show that her marriage is subsisting the non-citizen wife must also satisfy the Federal Government that she has resided in the Federation throughout the two years preceding the application and *intends* to do so permanently *and* that she is of good character. Therefore, the right of the applicant under this article is a right that she will have upon satisfying all the qualifications aforesaid. Article 15 does not confer any other right to the applicant. Secondly, although the Constitution is the supreme law of this country, the provisions of the Constitution relating to citizenship would seem to take cognizance of the laws or policy relating to immigration. This is evidenced from the definition of "residence" appearing in paragraph 19C of Part III of the Second Schedule to the Constitution wherein it is stated that a person shall be treated as having been at any time permanently resident in the Federation if, but only if, he was then resident in the Federation and either —

(a) he then had permission, granted without limit of time under any federal law, to reside there; or

(b) it is certified by the Federal Government that he is to be treated for those purposes as a permanent resident in the Federation.

Likewise, paragraph 20 which sets out the mode of calculating any period of residence in the Federation takes cognizance of not only the immigration laws but also the powers of the Minister responsible in the matter.

Section 15(1) of the Immigration Act (dealing with unlawful entry or presence in Malaysia) *inter alia* provides that a person shall not remain in Malaysia after the cancellation of any permit or certificate or after the cancellation of any pass, unless he is otherwise entitled or authorised to remain in Malaysia under the Act. It may be thought that the words "otherwise entitled or authorised to remain in Malaysia under his Act" appearing at the end of subsection (1) of section 15 could refer to such person as the applicant who is the wife of a citizen and who had been granted the status of a permanent resident before. But I cannot find any ground to support this argument because the words referred to must mean what they say expressly, that is, persons *entitled or authorised to remain in this country under the Immigration Act* and I find nothing in the Act that would so "entitle" or "authorise" the applicant. Therefore I cannot find any ground to justify the exclusion of the applicant from the provision of that section.

It is also contended on behalf of the applicant that unless the applicant is permitted to reside in Malaysia, Article 15 of the Constitution could become a dead letter. This is because, the argument goes, Article 8 of the Constitution (equality before the law and equal protection of the law) guarantees that the citizen husband should not be discriminated against and also provides for the safeguards to enable the citizen husband to practise his religion and that it is part of the teachings of all religions that a wife and her husband should live together.

In my opinion this argument is too far-fetched. The laws on citizenship and immigration rest solely on questions of public policy. To construe the law so as to confer a right on a non-citizen wife similar to the right obtainable in the original Article 15 of the Constitution would render ineffective the intention of the law-makers when they enacted the Act to amend Article 15 in 1962.

In *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prisons, Kuala Lumpur,*[1] the Federal Court in its judgment delivered by the Lord President dealt with the attitude for the courts to take in matters dealing with immigration in the following passages:

"Government is the most powerful body in the country and the court should be vigilant to see that Government does not exceed its power when dealing with individuals. But at the same time we are of the opinion that the problem of dealing with illegal immigrants is a matter of public policy to be decided by Parliament and by the Executive,

that in this matter the proper authority for enacting the necessary legislation is Parliament and that if the Government exercises a power conferred on it by Parliament and keeps within the law, then the duty of the court is quite clear; the court should simply apply the law, no matter how harsh its effect may be on the immigrant. His remedy is then not judicial, but political and administrative."

The appellant in that case had applied for an order of *habeas corpus* claiming that his detention was unlawful. He had previously renounced his citizenship and re-entered Malaysia. He was detained under section 34(1) of the Immigration Ordinance, 1959 so that arrangements could be made for his removal. The Federal Court said at page 158:

"Under the Immigration Ordinance, only the Executive has power to release the appellant. Whether or not the Executive should do so is a matter of policy for them. They have information and sources of information not available to the court and are moved by political, economic, social and cultural considerations which the court is not well equipped to apply, and judges should be slow to embarrass them into any course of action."

It is trite observation to say that the function of the court is merely to interpret and enforce the law however sad or unfortunate the consequences may be to an individual. The plea of the applicant in this case should therefore be addressed not to the court but to the appropriate authority.

On the question of alleged *mala fide* on the part of the immigration authority I find that the allegation is not supported by the facts.

In the affidavit of the applicant dated December 5, 1979 the applicant asked that the court grant such directions to permit the applicant facilities to make such application or appeal which she did not do before and if necessary for the court to grant an order extending the time of the appeal. From the facts of the case it is clear that the applicant and/or the husband were given every opportunity to appeal against the decision of the immigration authority but failed to do so without reasonable cause. If as contended by the applicant and the husband that throughout their transactions with the immigration authority they were advised by petition writers and immigration officers it is unreasonable to conclude that they were not advised as to their right of appeal even assuming that they did not know about it on the grounds that they were illiterate. For this reason I do not think it is proper for the court to interfere at this juncture and to make any order relating to the matter.

At the end of the hearing I adjourned the court to today's date for judgment. Counsel for the applicant asked for bail pending judgment of the court. I refused the application for bail on the grounds that there is no power to grant bail under section 365 of the Criminal Procedure Code — see also *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prisons, Kuala Lumpur, supra.*

Therefore my answers to the two questions referred to earlier in this judgment are as follows: —

(a) the Order of Removal under section 33(1) of the Immigration Act dated October 26, 1979 and the Order of Detention dated October 26, 1979 are not illegal and therefore the detention of the applicant is not unlawful;

(b) the applicant is not entitled as of *right* to an entry permit to enter or to remain in Malaysia by reason *solely* of the fact that her husband is a citizen.

Based on the foregoing the application is dismissed.

Application dismissed.

Solicitors: *Mahalingam & Co.*